Province of
British Columbia

ANNUAL REPORT
1985/86

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

86-05193/

LAW REFORM COMMISSION OF BRITISH COLUMBIA

ANNUAL REPORT 1985/86

LRC 86

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, *Chairman*

MARY V. NEWBURY, *Commissioner*

LYMAN R. ROBINSON, Q.C. *Commissioner*

Thomas G. Anderson is Counsel to the Commission.

Allan J. Perry is Legal Research Officer.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located on the
6th Floor, Chancery Place
865 Hornby St.
Vancouver, B.C.
V6Z 2A4

British Columbia Cataloguing in Publication Data

Law Reform Commission of British Columbia.
Annual report. — 1981–

Continues: Law Reform Commission of British Columbia. Annual report of the Law Reform Commission of British Columbia. ISSN 0381-2510
Report year ends Mar. 31, 1983/84–
Report for 1983/84 covers Jan. 1, 1983–Mar. 31, 1984.
ISSN 0381-2510 = Annual report of the Law Reform Commission of British Columbia.

1. Law Reform Commission of British Columbia.
2. Law reform - British Columbia - Periodicals.

KEB168.A72L38 354.7110088

TABLE OF CONTENTS

	Page
I INTRODUCTION	1
II PERSONALIA	1
III ACCOMMODATION	2
IV THE PROGRAM	2
A. *Developing the Program*	2
1. Introduction	2
2. Sources of Projects	2
(a) The Attorney General	2
(b) Other Sources	2
(i) Suggestions from Outside the Commission	2
(ii) Projects Generated Internally	2
(iii) Action on Suggestions	3
3. Criteria for Selection	3
(a) Credibility	3
(b) Is There a Legal Solution?	3
(c) Balance in the Program	3
(d) Empirical Research	4
(e) Likelihood of Implementation	4
4. Summary	4
B. *Carrying out the Program*	4
1. Research and Writing	4
2. The Consultation Process	4
C. *The Projects*	5
1. Debtor-Creditor Relationship Topics	5
(a) *Court Order Interest Act*	5
(b) Shared Liability	5
(c) Execution Against Shares and Securities	6
(d) Fraudulent Conveyances and Preferences	6
(e) Set-Off Against Assignees	6
2. Estates Topics	7
(a) The Effect of Testamentary Instruments	7
(b) Notice Requirements in Estate Matters	7
3. Contract Law Topics	7
(a) Performance Under Protest	7
(b) Contractual Mistakes	8
(c) Deeds and Seals	8
4. Defamation	8
5. Mortgage Law Topics	9
(a) Personal Liability under a Mortgage or Agreement for Sale	9
(b) Mortgages of Land: The Priority of Further Advances	9
(c) Floating Charges on Land	10
6. Legal Change and Prior Rights	10
7. Family Law Topics	11
(a) Family Property	11
(b) Spousal Agreements	11
(c) The Domicile of a Minor	12
8. The Action *Per Quod Servitium Amisit*	12
9. Subjects of Interest	12

TABLE OF CONTENTS—*Continued*

PAGE

V ACTION ON COMMISSION RECOMMENDATIONS 12

VI THE AVAILABILITY OF COMMISSION PUBLICATIONS 13

VII ACKNOWLEDGEMENTS 14

1. Commission Staff 14
2. Judges' Law Reform Committee 15
3. The Law Foundation 15
4. Defamation Committee 15
5. The Legal Profession 16
6. Continuing Legal Education Society 16
7. Ministry and Government Personnel 16

APPENDIX A

Reports and Recommendations Made by the Law Reform Commission of British Columbia 18

APPENDIX B

Matters Under Consideration 24

APPENDIX C

Minor Report: The Domicile of a Minor (LRC 80) 25

APPENDIX D

Commission Work Reviewed and Cited 27

To the Honourable Brian R.D. Smith, Q.C.
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present its Annual Report for 1985/86. It outlines the progress made by the Commission during the period from April 1, 1985 to March 31, 1986.

I INTRODUCTION

The Law Reform Commission of British Columbia was created by the *Law Reform Commission Act*, S.B.C. 1969, c. 14 and it commenced operation in 1970. The function of the Commission is set out in section 2 of the Act:

> The Commission is to take and keep under review all the law in the Province including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law . . .

The Commission's approach to this mandate has been described in its previous Annual Reports.

During the period under review, 5 final Reports were submitted to you on the following topics:

Performance Under Protest
The Domicile of a Minor
Defamation
Personal Liability Under a Mortgage or Agreement for Sale
Mortgages of Land: The Priority of Further Advances

The Commission also issued a major Study Paper on the law in relation to family property.

During the past year the Commission also circulated three Working Papers which have not yet resulted in final Reports. These Working Papers are on the following topics:

The Court Order Interest Act
Shared Liability
Spousal Agreements

II PERSONALIA

As presently constituted the Commission consists of three members: Arthur L. Close, Chairman; and Miss Mary Newbury and Professor Lyman R. Robinson, Q.C., Commissioners. This reflects a significant change in the composition of the Commission which occurred in December 1985 with the appointment of Professor Robinson. Both Miss Newbury and Professor Robinson serve on a part-time basis.

Professor Robinson's appointment to the Commission coincided with the appointment of the Commission's former Vice-Chairman as a Justice of the British Columbia Court of Appeal. This development was marked by the following resolution of the Commissioners:

> The Members of the Law Reform Commission wish to express their gratitude to its former Vice-Chairman, the Honourable Mr. Justice Ronald I. Cheffins, for his contribution to law reform and his service to the people of British Columbia. He served the Commission from September 1983 until his appointment as a Justice of the Court of Appeal in December, 1985. This was a time marked by high productivity and significant progress in implementing past recommendations. He was conscientious in the execution of his duties and the wisdom he brought to the Commission will be greatly missed.

III ACCOMMODATION

A significant development during the closing months of the past year was the Commission's move from the Toronto Dominion Bank Tower into new premises located on the sixth floor of Chancery Place in Vancouver. The new premises are somewhat nearer to the courthouse and its library, and we expect this move will lead to a significant long-term saving in the cost of housing the Commission, without any significant loss in space or convenience.

IV THE PROGRAM

A. DEVELOPING THE PROGRAM

1. Introduction

When the Law Reform Commission of British Columbia became operational in 1970 its first act was to develop a program of projects and studies which it intended to pursue. Developing its program involved a highly visible process of consultation with the Ministry of the Attorney General, the legal profession and the public.

Today, owing to the incremental nature of changes in the Commission's program, the process of developing it is much less visible. From time to time, therefore, we are asked about the way in which topics are selected for examination and report by the Law Reform Commission. The purpose of this portion of our Annual Report is to attempt, briefly, to describe the process.

2. Sources of Projects

(a) *The Attorney General*

Under section 2 of the *Law Reform Commission Act* the Attorney General may refer specific subjects to the Commission for examination and report. Various Attorneys General have done so on a number of occasions over the years, and about 30 percent of our Reports have their origins in such a reference. In recent years, the number of references has declined and, at this time, only two of our active projects arose in this way (*Court Order Interest Act* and the Action *Per Quod Servitium Amisit*).

(b) *Other Sources*

(i) *Suggestions from Outside the Commission*

The Commission frequently receives suggestions for law reform measures or which identify areas of the law regarded as unsatisfactory. These suggestions emanate from the legal profession (both from individual practitioners and through the official organs of the bar such as the sections of the Canadian Bar Association), judges and the general public.

(ii) *Projects Generated Internally*

The Commission's legal staff monitors a large number of reports and legal periodicals. These are a fruitful source of potential projects. An article written by an academic lawyer in a learned journal may identify unsatisfactory aspects of the law which call for reform. Judges will occasionally find themselves applying a doubtful rule and the reasons for judgment may set out a cry (sometimes ringing, sometimes muted) for reform. We also maintain reciprocal exchange agreements with other law reform agencies throughout the world. Occasionally work being done by a law reform agency in, say,

Australia, may alert us to the fact that our own law is deficient in the area under consideration.

(iii) *Action on Suggestions*

Once an area of the law has been identified as suitable for possible action by the Law Reform Commission one of two things might happen. First, if the suggestion deals with a short, neat point which is unlikely to be controversial, we may proceed on it immediately with a Minor Report to the Attorney General. An example of this is the Minor Report which is set out as Appendix C to this Annual Report.

Most often, however, the Commission's first step is to open a file on the suggestion as one of a large number of "subjects of interest." Once such a file has been opened, we start gathering material on the topic under consideration. We may communicate with individuals knowledgeable on the particular topic to get their views on the desirability of reform in the area. We may canvas other jurisdictions to see if the particular subject has been perceived as a problem there and, if so, what the response has been.

Approximately once each year we review our program and, in particular, the subjects of interest files to identify those topics which might be suitable for addition to our program for active work.

3. CRITERIA FOR SELECTION

Outlined above are the various sources of topics for potential Commission projects. Given their numbers, it is necessary to pick and choose among them. The next question is what considerations underlie a decision to select one topic, in preference to another, for action. There is no single criterion, but a number of the factors relevant to this decision are outlined below.

(a) *Credibility*

The Commission and its professional staff is composed wholly of lawyers and the Commission has, generally, tended to confine its work to areas where lawyers are recognized as having particular credibility. Our specialty is the formulation of legal policy. If in a particular topic, the issues of legal policy are less significant than policy issues on which other disciplines have greater expertise, we would probably tend to defer. This is an issue on which we have commented at length in previous Annual Reports.

(b) *Is There a Legal Solution?*

Many issues brought to the Commission's attention do not turn on defects in the substantive law. Rather, the defects are in matters of administration and the institutions through which the law is applied. While there is no hard and fast position on this, the Commission tends to be cautious in approaching topics which appear to call for altered institutional arrangements rather than "self-executing" changes in black letter law.

(c) *Balance in the Program*

The Commission attempts to maintain a program which is balanced in a number of ways. There is a balance between large projects and small projects. There is a balance between projects which are intensely theoretical and projects which are intensely practical. There is also a balance in respect of subject matter. It would be unfortunate if the Commission were perceived as devoting its resources wholly to lengthy projects on one narrow area of law however valuable or important work in that area might be.

(d) *Empirical Research*

Empirical research is expensive and time-consuming and our ability to undertake it is very limited. If it is in the nature of a particular project that credible recommendations can only be made on the basis of empirical research that is beyond our means, we would usually not undertake it.

(e) *Likelihood of Implementation*

The issue of how far the program of a law reform agency should be shaped by implementation considerations is a difficult one on which views may, quite properly, vary widely. The view that has generally prevailed in this Commission over the years is that we should not be deterred from undertaking a study in which an important point of principle is involved by reason only that the government of the day may not share the Commission's sense of urgency with respect to reform in the area involved, or may be hostile to the recommendations likely to emerge. At the same time, we have been sensitive to the fact that the Commission is a publicly funded agency and this carries with it the responsibility to manage its resources in the way most likely to achieve results.

4. SUMMARY

As law reform agencies go, the British Columbia Commission has adopted a highly pragmatic approach to the way in which it selects its topics. Once a topic has been selected, however, the Commission has been less restrained and has been prepared to come up with highly innovative solutions and proposals. It should also be noted that the criteria that are applied to the selection of Commission topics are not part of an articulated policy. They really emerge from an examination of the Commission's work over the years.

B. CARRYING OUT THE PROGRAM

1. RESEARCH AND WRITING

The research to carry out the program calls for time-consuming work by qualified people. This can be achieved by having the research done by personnel who are employed full-time or by persons with special expertise who are retained on a part-time or occasional basis. Although in the early years, the Commission relied heavily on outside consultants, our experience has led to a preference for the former approach. Consequently, most of the research and writing is now conducted by full-time members of the Commission staff.

2. THE CONSULTATION PROCESS

The Commission makes a general practice of inviting comment and criticism of its research and analysis before submitting a formal Report on any particular subject. This process of consultation greatly assists the Commission in developing recommendations for the reform of the law that are both relevant and sound.

The chief means by which the Commission carries out this process is through the circulation of Working Papers to those who are knowledgeable, or who have a special interest in the subject under study. A Working Paper sets out the tentative views of the Commission and outlines the background against which these views were formed. Comment on any aspect of the Working Paper is invited. Occasionally, copies of a draft Report may be given limited

circulation for comment, if the topic under consideration makes the wide circulation of a Working Paper inappropriate.

Whatever consultative mechanism is adopted, the Commission thoroughly re-examines its tentative conclusions in the light of the comment and criticism received. Final recommendations are developed accordingly.

C. THE PROJECTS

The description below is limited to those projects upon which Reports have been made in the past year or upon which work is in progress. Details of other Reports may be found in earlier Annual Reports. Included as Appendix A is a table setting out all Reports which the Commission has made to date, and references to legislation in which the recommendations have been implemented in whole or in part. In Appendix B, another table sets out those matters which are now under consideration.

1. Debtor-Creditor Relationship Topics

(a) *Court Order Interest Act*

Early in 1983, the former Attorney General requested that the Commission "undertake a review of the *Court Order Interest Act* and, in conjunction with an examination of the *Uniform Judgment Interest Act*, consider whether all or parts of the Uniform Act should be incorporated in our legislation."

In May 1985 the Commission issued a Working Paper (W.P. 49) on this topic. The Working Paper is a lengthy one, in excess of 400 pages, and is probably the most comprehensive examination of judgment interest legislation, and the principles which underlie it, ever undertaken in Canada and possibly in the Commonwealth.

The Working Paper sets out 40 proposals for reform covering such diverse aspects of the Act as the setting of interest rates, accommodating interim payments, the temporal apportionment of awards between pre-trial and post-trial losses for the purposes of calculating interest, "initial outlays," the compounding of judgment interest, and the definition of "pecuniary judgment."

The most innovative proposal is that a new method be adopted for ascertaining judgment interest. Rather than requiring the litigants to do complicated percentage-based computations, it is proposed that this burden be shifted to a computer, with court registry officials issuing, on a monthly basis, tables of figures which embody the results of these calculations. This proposal has the potential to greatly simplify counsel's task while, at the same time, accommodating nuances such as compounding and frequent changes in interest rates which would otherwise be impracticable.

We are continuing to receive responses to the Working Paper and hope to submit our final Report later in 1986.

(b) *Shared Liability*

This project concerns some of the basic rules of joint liability and joint and several liability and the particular application of those rules in the context of contributory fault. In May 1985, the Commission issued a Working Paper (W.P. 50) which set out proposals for certain changes in those rules.

For reasons described in the Working Paper, the Commission tentatively concluded that, in most cases of shared liability the rights of all parties are more equitably handled through the concept of joint and several liability

rather than that of joint liability only. A proposal is made for an amendment to the *Law and Equity Act* which embodies that conclusion. The Working Paper also considers, and makes proposals respecting, rights of contribution where:

(a) there are several defendants whose degrees of fault are unequal and the plaintiff is also guilty of contributory fault; and

(b) the liability of one of two or more persons who have contributed to the loss of another is limited by a contractual stipulation, a release, or an enactment.

The Commission is continuing to consult with interested parties on these proposals and hopes to submit its final recommendations later in 1986.

(c) *Execution Against Shares and Securities*

The Study Paper on the *Office of the Sheriff* published by the Commission in 1983 identified a number of problems which arise out of the body of law which currently governs the seizure and sale of shares and securities by an execution creditor. These problems are both substantive and procedural. What interests in shares are exigible? What is the status of shares in extra-provincial companies? What is the status of a charging order? What is the appropriate method of seizure? How may shares in closely held corporations be valued? What method of sale may the sheriff employ? Recent litigation has highlighted some of these problems.

Late in 1984 the Commission engaged Professor Elizabeth Edinger of the Faculty of Law, University of British Columbia to prepare a research document on this topic. That document has now been received and the Commission is in the process of developing terms of reference for its own work in this area.

(d) *Fraudulent Conveyances and Preferences*

This project comprises a study of the operation of the *Fraudulent Conveyance Act* and the *Fraudulent Preference Act*. Work is now far advanced and the preparation of a Working Paper with tentative proposals for reform is nearing its final stages. We hope to be in a position to circulate the Working Paper in the summer of 1986.

(e) *Set-Off Against Assignees*

When "A" attempts to enforce payment of a debt owing to him by "B" it is regarded as fundamentally fair that "B" should be entitled to have taken into account any money owing from "A" to "B." This is generally referred to as a right of "set-off." In general, the body of law which governs set-off is satisfactory. There is, however, one instance in which the right of set-off is limited and, arguably, operates unfairly.

Where the right to payment of a debt has been assigned, a right of set-off can usually be asserted against the assignee only where the obligation on which the set-off is based was in existence before the assignment. That rule is unobjectionable where the assignor and assignee were dealing at arm's length and for value and the debtor received notice of the assignment. Where, however, the assignment is a reflection of the assignor's insolvency and the assignee is his trustee or receiver, the situation is somewhat different and the application of this rule on first analysis appears not to be wholly satisfactory, (*see Business Computers Ltd.* v. *Anglo African Leasing*, [1977] 2 All E.R. 741, and *C.I.B.C.* v. *Tuckerr Industries Inc.*, (1982) 44 C.B.R. 215 (B.C.S.C.)).

This project will examine the operation of set-off in these circumstances. Work has commenced and we hope that if the Commission considers that legislative change is desirable, the first draft of a Working Paper will be available for consideration by the Commission by mid-1986.

2. Estates Topics

(a) *The Effect of Testamentary Instruments*

In several previous Reports, the Commission has examined problems existing in the law of succession. Our previous work has focused on legislation affecting succession rights, and ensuring that technical rules do not prevent the courts from giving effect to a testator's will. Even where the testator's original intent is beyond dispute, events may occur which render it impossible to give effect to his intent. A beneficiary may predecease the testator. Property disposed of by will may have become altered in form.

In this part of the Estates Project the Commission will examine a number of issues arising out of such occurrences. In particular, the legal rules concerning lapse, ademption, conversion, election and disclaimer will be examined. Work has commenced on this study although we are unable to predict when a Working Paper is likely to be circulated.

(b) *Notice Requirements in Estate Matters*

This study will examine the various notice requirements which the law imposes with respect to obtaining letters probate and letters of administration and in the administration of estates. This project was added to our program in 1986 and we hope to commence work on it shortly.

3. Contract Law Topics

(a) *Performance Under Protest*

Where the parties to a contract differ as to the nature or extent of the obligations which it imposes on one of the parties, very often the best course for all concerned is for that party to perform the contract in accordance with the requirements of the other party but to do so "under protest" purporting to reserve the right to assert a claim for additional compensation at a later date. There is some question, however, how far this course of action is open. The source of this uncertainty is the much-criticized decision of the Supreme Court of Canada in *Peter Kiewit Sons Co. of Canada* v. *Eakins Construction Ltd.*, handed down in 1960.

Even after the passage of 25 years, no consensus has emerged as to the full implications of this case, but on at least one widely held view, it stands for the proposition that performance, even though it is purported to be carried out under protest, constitutes a waiver of any claim the performer might have for additional compensation. In the construction industry, the context in which the *Kiewit* case arose, the uncertainty created is regarded as a particularly serious problem, although the decision may have implications throughout the whole of contract law.

In May 1985, the Commission submitted a Report (LRC81) which set out recommendations to clarify the right of a party to perform under protest and which would provide a statutory right to claim compensation, on a basis akin to *quantum meruit*, in those circumstances.

(b) *Contractual Mistakes*

A tangled and troubled area of contract law is that relating to mistake. This may include mistake as to the terms, subject matter or the identity of the parties involved. A mistake may be common, mutual, or unilateral.

In New Zealand, legislation has been enacted aimed at clarifying the rights of the parties in these circumstances. In this project we propose to examine the New Zealand legislation in a Canadian context to determine if similar reform is desirable in British Columbia.

(c) *Deeds and Seals*

In British Columbia today most business arrangements are intended to take effect as simple contracts. Many such arrangements may, however, also be the subject matter of a deed. Simply affixing a seal to a document at the time it is executed may be sufficient to transform a simple contract into a deed.

The effect of making a deed is that a whole body of obscure law in relation to deeds suddenly becomes applicable to the transaction. Different rules of interpretation may apply to the transaction, different parties may be bound by it, a necessity for "delivery" arises, and there are different rules concerning its variation or discharge.

In most cases where the parties execute a deed it is likely that they have done so inadvertently, in the sense that they have no real understanding of the technical, legal implications of affixing a seal. Nonetheless, many documents do take the form of deeds, particularly those executed on behalf of companies which are then impressed with the company seal. The difficulty is that a company seal is generally regarded as a mark of authentication, in the nature of the company's "signature." The seal is affixed to what otherwise would be a simple contract without any person involved in the transaction realizing the full import of what has been done.

In most cases nothing turns on the fact that a document has been executed as a deed. The parties treat it as though it were any other contract. Where, however, something goes awry, ingenious counsel will, from time to time, delve into the ancient learning respecting deeds and come up with a highly technical defence that would not otherwise exist.

The Commission has engaged Professor Robert Howell of the Faculty of Law, University of Victoria to prepare a research paper on this topic.

4. DEFAMATION

In 1983 the Law Reform Commission constituted a Special Committee to undertake an examination of the law in relation to defamation and to consider and report to the Law Reform Commission with recommendations for its development and reform. This is the first time that the Commission has exercised its power under section 4 of the *Law Reform Commission Act* to appoint a committee charged with examining a discrete area of the law with a view to formulating recommendations for reform. The Report of the Committee was formally transmitted to the Commission in August 1985.

The Committee's Report was carefully considered by the Law Reform Commission and the conclusions and recommendations of the Special Committee were adopted by the Commission as its own. The Committee's recommendations were, therefore, transmitted as part of a formal Report of the Law Reform Commission (LRC 83). The Committee's Report was reproduced in full along with an appendix setting out draft legislation to implement its recommendations.

The Report recommends a number of important changes in the law of defamation. These include the abolition of the distinction between libel and slander, clarification of a number of aspects of the law respecting privilege and fair comment, and numerous procedural changes.

5. MORTGAGE LAW TOPICS

(a) *Personal Liability under a Mortgage or Agreement for Sale*

The recent drastic increase in the volume of foreclosure applications being heard in our courts has brought to light certain difficulties and deficiencies in the law relating to foreclosure practice. Questions relating to the judgment on the borrower's covenant have proved to be particularly troublesome. In September 1985, the Commission submitted a Report (LRC 84) on this topic.

In the Report, recommendations for reform are set out which focus primarily on three separate issues. The first is the rule that the lack of privity of contract between the mortgagee and a transferee of the mortgagor's interest prevents the mortgagee from maintaining an action against the transferee with respect to liability on the covenant, even though the transferee may ultimately be liable to pay through the effect of one or more proceedings for indemnity. It has been recommended that the mortgagee should be permitted to proceed directly against the transferee.

A second issue concerns the duration of the mortgagor's personal liability to the mortgagee. Currently, the original mortgagor will often remain liable under a mortgage even after there has been a transfer of the property and the mortgagee has engaged in direct dealings with the transferee up to and including the modification of the mortgage in a manner which amounts to its renewal. Recommendations are made concerning the termination of the original mortgagor's personal liability.

The Report also examines the statutory indemnity provided by section 20 of the *Property Law Act* when there has been a transfer of the mortgagor's interest. There are circumstances in which that statutory right of indemnity can operate unfairly and recommendations are made to clarify its proper sphere of operation.

Finally, recommendations are made concerning agreements for sale, to ensure that, so far as possible, the law governing that form of security interest parallels the law governing mortgages.

(b) *Mortgages of Land: The Priority of Further Advances*

A mortgage of land will frequently provide that it shall stand as security for a number of advances of money from the lender to the borrower. The lender, however, does not always obtain priority for his further advances over an intervening encumbrancer. In this situation priorities are governed by section 24 of the *Property Law Act*, R.S.B.C. 1979, c. 350 which restates, in statutory language and in a slightly modified form, the old equitable rules respecting the "tacking" of further advances under a mortgage of land.

In January 1986, the Commission submitted a Report (LRC 85) which examined this area of the law. The Report concludes that section 24 fails to meet the needs of modern commercial financing in two important areas. These are where advances are made under a running account arrangement between the parties, and where the advances are to enable the construction of an improvement on the mortgage property. In both cases an enhanced priority for the mortgage lender is recommended.

In the context of construction financing, the Report also considers the implications of the recent decision of the Court of Appeal in *Yorkshire Trust Co.* v. *Canusa Construction Ltd.*, (1984) 54 B.C.L.R. 75.

(c) *Floating Charges on Land*

The floating charge on personal property is a relatively familiar type of business arrangement. It is a security device which gives a lender a security interest in a fluctuating mass of property, such as a borrower's inventory or equipment, which may change its identity over time. The essence of such an arrangement is that the borrower may sell or encumber this property in the ordinary course of his business, free and clear of the lender's interest, until such time as the charge "crystallizes." When a floating charge crystallizes (usually through some active step taken by the lender as a result of the borrower's default) the charge ceases to float. It descends and then becomes fixed on particular assets of the debtor.

The law has less experience with floating charges on land. Seldom is this kind of arrangement deliberately chosen by the parties in preference to other forms of security. This is largely because a "fixed" charge on land is regarded as more secure. A floating charge on land may arise incidentally under a security agreement primarily aimed at personal property, but which is drafted broadly enough to charge "all the property" of the borrower.

There is a substantial measure of uncertainty as to how a floating charge on land may be accommodated within a Torrens system of land registration. Nonetheless, there are circumstances where a floating charge on land could be seen as fulfilling a need. This might occur, for example, where the borrower is a developer whose inventory consists of various parcels of land in which he wishes to deal freely without the necessity of recording or discharging the lender's interest in the Land Title Office each time a piece of property is bought or sold. The floating charge on land has received limited recognition in our case law (*see Daon Development Corp.* v. *National Trust Co. Ltd.*, (1982) 39 B.C.L.R. 341).

This study will address a number of questions. A basic question is whether floating charges over land should be permitted at all, given the principles underlying our system of land registration. If they are to be permitted, what registration mechanism should apply to them and what should be the priority implications of such registration? What should be the mechanics of crystallization?

Work on this study commenced early in 1986 and we hope to be in a position to circulate a Working Paper for comment before the end of the year.

6. Legal Change and Prior Rights

Rights and obligations which are acquired under the law as it exists at any given time are not lightly to be tampered with. When the law is consciously changed, as through legislation, the change normally has only a prospective effect. Where legislation is made to operate retroactively, it is usually only after the parties affected have had some notice that the change is going to be implemented or where the issue of prior rights has been carefully considered and a conscious policy decision arrived at.

Sometimes, however, legal change can come suddenly and unexpectedly. It may occur, for example, where an appellate court makes a pronouncement which creates a change in the law. It may happen where a statute or bylaw under which parties have acquired rights and obligations is declared to

be *ultra vires*. What is, or should be, the legal position of a party who is affected by this kind of legal change? That is the subject matter of a project that was tentatively added to our program in 1984. We are currently in the process of defining more precise terms of reference for a possible study.

7. FAMILY LAW TOPICS

(a) *Family Property*

Late in 1983, a tentative decision was taken by the Commission to re-enter the troubled area of family law. Among the largest and most difficult of the individual topics which were identified as suitable for potential action by the Commission was that of family property. As a preliminary step, the Commission engaged Mr. Michael Karton, of the Vancouver Bar, to prepare a survey of the current jurisprudence and practice surrounding the provisions of the *Family Relations Act* concerning family property. Mr. Karton's paper was received and considered by the Commission in 1984 and it became evident that the subject matter was so large and technical that Commission resources would not permit it to proceed on all fronts at once.

The Commission's strategy was to identify one particular aspect of family property law which could be studied discretely with a view to early action. That aspect was the power of the courts to alter agreements relating to family property and is more fully described under the heading Spousal Agreements.

A Study Paper on Family Property was prepared by Mr. Thomas G. Anderson, Counsel to the Commission, and Mr. Karton, based on Mr. Karton's research. The Study Paper was published by the Law Reform Commission late in 1985.

To the best of our knowledge, the Study Paper is the only document which attempts to gather and analyse the British Columbia jurisprudence in a comprehensive and meaningful fashion. It is too early yet to assess the impact it may have, but it is our hope that it will lead to a more sophisticated understanding of, and approach to, the *Family Relations Act*.

(b) *Spousal Agreements*

Much of the litigation spawned by the *Family Relations Act* has arisen where spouses have entered into an agreement concerning family property but then, for one reason or another, one of the parties seeks to vary that agreement. Under the *Family Relations Act* the courts have wide powers to vary an agreed distribution of family property but the exercise of these powers has given rise to much confusion and uncertainty.

Difficulties arise from the sections of the Act which confer that jurisdiction. In fact, there are two distinct sections which confer independent but overlapping powers on the courts. The scope of those sections and the kinds of agreements to which they apply is uncertain. The relationship between the two sections is inadequately articulated. The simple act of rationalizing the legislation in this area might significantly reduce and simplify litigation.

A more basic question, however, is whether the powers conferred on the courts to vary these agreements are too broad. While this is not an area where one can be dogmatic about sanctity of contract, it may be that the present legislation pays too little regard to this value. A basic policy of the *Family Relations Act* seems to be to encourage spouses to reach their own agreements concerning the division of family property. This policy is frustrated, however, if the courts are permitted to overturn such agreements regularly.

In August 1985 the Commission issued a Working Paper (W.P. 51) which considers the present jurisdiction of the courts to alter consensual distributions of family property. The Commission's provisional view, set out in the Working Paper, is that the jurisdiction of the courts is unnecessarily wide and that agreements between spouses concerning the distribution of property on a marriage breakup should be interfered with only where the agreement has been unfairly obtained. The Commission hopes to submit its final Report later in 1986.

(c) *The Domicile of a Minor*

The *Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68, introduced last year contained important measures respecting the legal status and rights of married women and of children. An unintended effect of these measures, however, is that they may have rendered uncertain the rules for determining the domicile of a minor. Accordingly, in late September a Minor Report (LRC 82) was submitted which contained recommendations aimed at providing a clear and comprehensive set of rules for ascertaining the domicile of a minor, having regard to the changes wrought by the Act. The full text of the Report is set out as Appendix C to this Annual Report.

8. The Action Per Quod Servitium Amisit

The action *per quod servitium amisit* is of some antiquity. It permits a master to recover damages for losses arising from an injury to his servant.

The current utility of this action has been doubted and its availability has been significantly restricted in England so that it arises only for injury to a domestic servant. In British Columbia, the action appears to exist unchanged from its feudal origins.

The Attorney General has requested the Commission to consider whether the action should be abolished or retained in some modified form.

9. Subjects of Interest

Preliminary research or the gathering of material regularly proceeds on a number of matters which are not yet part of the Commission's program. In most cases this is to determine if a particular topic is appropriate for formal inclusion in the program as a Commission project. Many of these matters which are under preliminary consideration arise out of particular suggestions made, and problems drawn to the Commission's attention, by the legal profession and members of the public. This is discussed more fully in Part IV A of this Annual Report.

Our subjects of interest files also embrace topics which once formed part of the Commission's active program but which have now, for one reason or another, become dormant. An example of such a topic is our work with respect to the Reception of English Statute Law in the Province. We have gathered, and continue to gather, a significant body of materials on this subject against the day when we may have the resources to reawaken it once more.

V ACTION ON COMMISSION RECOMMENDATIONS

In our last Annual Report, we expressed our pleasure at the introduction and passage of the *Law Reform Amendment Act, 1985*, which implemented recommendations contained in seven past Commission Reports. We also

welcomed the statement of the Attorney General that he intended to introduce further legislation implementing Commission recommendations.

This foreshadowed developments later in the 1985 Legislative session which saw action on six additional Law Reform Commission Reports:

Report on Arbitration (LRC 55)

The Commission's recommendation that legislation be enacted whereby British Columbia would adhere to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) was implemented through the enactment of the *Foreign Arbitral Awards Act*, S.B.C. 1985, c. 74.

Standing of a Common Law Spouse to Apply Under the Family Compensation Act (LRC 61)

The recommendation that a common law spouse have standing to apply for relief under the *Family Compensation Act* was implemented in the *Family Law Reform Amendments Act, 1985*, S.B.C. 1985, c. 72, s. 3.

Interspousal Immunity in Tort (LRC 62)

The Commission's recommendation that spouses should be able freely to sue each other in tort was implemented in the *Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68, ss. 50-53, 79, 83, 98.

Breach of Promise of Marriage (LRC 64)

A recommendation that the action for damages for breach of promise of marriage be abolished was implemented in the *Family Law Reform Amendments Act, 1985*, S.B.C. 1985, c. 72, ss. 1, 36.

Intentional Interference with Domestic Relations (LRC 68)

The Commission's recommendations that actions for damages for adultery or for the enticement or harbouring of a spouse be abolished were implemented in the *Family Law Reform Amendments Act, 1985*, S.B.C. 1985, c. 72, ss. 35, 37, 40.

Report on the Land (Wife Protection) Act (LRC 71)

This Minor Report pointed out that the Act was vulnerable to a challenge under section 15(1) of the *Charter of Rights and Freedoms*. It was recommended that husbands and wives should have corresponding rights to file against a matrimonial home owned by the other to prevent a disposition without the consent or knowledge of the non-owning spouse. This recommendation was implemented in the *Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68, ss. 61-78.

VI THE AVAILABILITY OF COMMISSION PUBLICATIONS

All final Reports on major topics issued by the Commission have been published in a typeset format, with the intention that they be available to the public. Our Annual Reports are distributed by the Commission and are available on request and free of charge so long as stocks last.

From time to time the Commission also submits minor Reports, in the form of a letter to the Attorney General. These minor Reports are usually reproduced in full as appendices to the Annual Report which covers the period in which the minor Report was made.

The Provincial Queen's Printer is responsible for the distribution of all Reports made by the Commission on particular topics. A nominal charge is made for copies of those Reports. Orders and inquiries as to prices should be directed to:

The Queen's Printer
Publications
Parliament Buildings,
Victoria, B.C. V8V 4R6
Telephone: 387-1901

A number of our early Reports are now out of print and are not available for purchase. Those Reports are indicated with an asterisk in Appendix A.

The Queen's Printer maintains a "notification list" and upon publication of a Commission Report, all persons on the list are so advised. Anyone who wishes to be added to that list should contact the Queen's Printer.

Working Papers are produced in a typescript format by an offset process and the Commission is responsible for their distribution. Working Papers are usually produced in limited quantities and our supplies of them are invariably exhausted by, or shortly after, their initial distribution. Usually we are unable to respond to requests either for copies of past Working Papers or to be placed on a mailing list to receive copies of all Working Papers.

VII ACKNOWLEDGEMENTS

1. Commission Staff

As we have pointed out in previous Annual Reports, our policy of doing the greater part of our research work internally, rather than relying on outside consultants, places a heavy burden of responsibility on the shoulders of our permanent staff. They invariably respond to the challenge with energy, enthusiasm and careful scholarship. We wish to express our sincerest thanks to all those individuals who, in the past year, contributed to our work in this way.

Our particular thanks go to Mr. Thomas G. Anderson, Counsel to the Commission, for the loyalty and industry he has devoted to the affairs of the Commission. As our senior staff member, he bears a heavy responsibility for the overall direction of the Commission's program as well as carriage of specific projects.

A very significant contribution to our work was also made by Mr. Frederick Hansford, our former staff lawyer. In January, Mr. Hansford left us to resume private practice. We wish to express our sincere thanks for his contribution and wish him well in his future endeavours.

Joining the Commission's legal research staff in February was Mr. Allan J. Perry. The first projects to occupy his attention are those on Set-Off Against Assignees and Floating Charges on Land.

Three individuals also served the Commission on a short-term basis. Over the summer months two students of the University of British Columbia, Faculty of Law, worked with us. Miss Karen Pettifer did valuable work in updating our collection of materials on the Reception of English Law and Mr. David Goodwin did basic research and gathered and organized material which

formed part of the Study Paper on Family Property. We were also joined for six weeks by Mr. Kyle Friesen who undertook basic research in relation to our project on the Effect of Testamentary Instruments.

Our support staff also make a notable contribution to the work of the Commission. They bring intelligence and efficiency to their duties and share a concern that our work should be of the highest quality in every respect. Our support staff presently consists of Sharon St. Michael, Secretary to the Commission and Brenda Barrett, Clerk-Stenographer. We thank them for their efforts on our behalf.

2. Judges' Law Reform Committee

The Judges' Law Reform Committee is important to our operation. This Committee provides a continuing point of contact with the judiciary. The members of the Committee are The Honourable Mr. Justice Macfarlane of the Court of Appeal (Chairman), The Honourable Mr. Justice Taylor, The Honourable Mr. Justice Spencer and The Honourable Mr. Justice Bruce Macdonald of the Supreme Court, The Honourable Judge Huddart of the Vancouver County Court, and His Honour Judge Collings of the Provincial Court. The members of the Committee assist us through responding to our Working Papers and other consultative documents and by calling to our attention defects in the law that they are well-situated to identify. They bring a unique perspective to bear on our work.

The burden which the Commission's work imposed on the Judges' Committee in the past year was particularly onerous owing to the size and complexity of our Working Paper on the *Court Order Interest Act*. The responses and advice which the Committee provides are invariably cogent and helpful. The work of the Judges' Committee plays a major role in the law reform process and we are immensely grateful to the individual members of the bench who give so generously of their time and energy to this end.

3. The Law Foundation

Previous Annual Reports have described the generous response of the Law Foundation of British Columbia to the Commission's requests for funding to help sustain its operation. In the past year, the Foundation again provided much needed assistance.

The support of law reform is listed as one of the Foundation's objects in the statute under which it is constituted. In enabling the Law Reform Commission to carry on with its functions, the Law Foundation has truly fulfilled that object and rendered an important service to the people of the Province. Our particular thanks go to Mrs. Marlene Scott, Q.C., Chairman of the Foundation and Mr. Michael Jacobsen, its Executive Director.

4. Defamation Committee

Earlier in this Report we described the work of the Special Committee on the Law of Defamation whose Report to the Law Reform Commission formed the basis of our own Report to the Attorney General. The members of the Committee were:

Bryan Baynham, *Chairman*
Barrie Adams
Professor Jerome Atrens
Rees Brock, Q.C.
Peter Butler, Q.C.
David Gooderham
Kenneth C. Mackenzie
Anthony J. Spence
Hon. Mr. Justice Taylor
Bryan Williams, Q.C.

The Commission was fortunate that this group of knowledgeable and uniquely qualified individuals agreed to serve on the Committee. The Report which they produced is a reflection of the diligence and expertise which they brought to their task. We would like to express our gratitude to each member of the Committee for the time and effort which was devoted to this study. Our particular thanks go to the Committee Chairman, Bryan Baynham and the Committee Secretary, Professor Jerome Atrens. Both made a very special contribution to the Committee's work.

5. The Legal Profession

The support which we have received from the organized bar and its individual members in past years has continued. We rely heavily on the assistance of the legal profession in a number of ways. At the research stage of our projects, individual lawyers assist us in gathering facts and in acting as a "sounding board" with respect to various approaches to difficult issues. Requests for help of this kind are invariably the subject of a generous response. At the more formal stage of consultation, various Sections of the British Columbia Branch of the Canadian Bar Association assist us in our deliberations with thoughtful submissions on the various proposals and tentative conclusions set out in our Working Papers. We wish to thank all members of the bar who gave generously of their time and experience in the past year.

6. Continuing Legal Education Society

Our previous Annual Report foreshadowed the possibility of a closer relationship between the Continuing Legal Education Society of British Columbia (CLE) and the Law Reform Commission. Preliminary steps in this direction were taken in the past year. Arrangements were put in place which permitted Commission personnel to participate much more extensively in the CLE course work and activities. One important aspect of this is the membership of Mr. Thomas G. Anderson, Counsel to the Law Reform Commission, on the Editorial Board for the development of a practice manual on family agreements.

7. Ministry and Government Personnel

There are a number of individuals and agencies within Government who have in the past year, contributed to the work of the Commission.

The Law Reform Commission has always had a special relationship with the office of Legislative Counsel. Its personnel are invariably responsive and helpful when we request assistance in the preparation of proposed legislation. The work leading up to the legislation referred to in Part V of this Report has brought us into even closer contact with them. We particularly wish to thank Mr. Allan Roger, Chief Legislative Counsel, and Messrs. Herb Thornton, Cliff Watt, and Ms. Claire Reilly of his office.

The Queen's Printer is responsible for printing our Reports. Its personnel bring a high level of skill, dedication and professionalism to the work they do for us and we are pleased to take this opportunity to thank them and acknowledge their important role.

Earlier in this Report we referred to our relocation to new premises in Chancery Place. We wish to express our gratitude to two individuals who assisted us throughout that process: Mr. Ismail Vohra of the British Columbia Buildings Corporation and Mr. C. ris Brambell of the Facilities Management Unit, Ministry of Attorney General.

Finally, we wish to thank the Attorney General and all those within his Ministry who, during the period under review, in their dealings with the Commission on a day-to-day basis have contributed to our work and made life easier. In particular our thanks go to The Honourable E.N. Hughes, Q.C., the Deputy Attorney General; Associate Deputies, Messrs. Robert Adamson and Frank Rhodes; Mr. Ken Horodyski, Acting Director, Information Services; and Gordon Hogg and Leslie Holding, both Senior Financial Officers in the Ministry. All have, in one way or another, assisted us greatly.

ARTHUR L. CLOSE
MARY V. NEWBURY
LYMAN R. ROBINSON

April 18, 1986

Appendix A

REPORTS AND RECOMMENDATIONS MADE BY THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

No.	Title	Date	Recommendations Implemented in Whole or in Part by
1	Limitations—Abolition of Prescription*	Dec. 1970	*Land Registry (Amendment) Act, 1971*, S.B.C. 1971, c. 30, s. 8 (see now *Land Title Act*, R.S.B.C. 1979, c. 219, s. 24).
2	Annual Report, 1970*	Dec. 1970	Not applicable.
3	Frustrated Contracts Legislation*	Feb. 1971	*Frustrated Contracts Act*, S.B.C. 1974, c. 37 (see now *Frustrated Contract Act*, R.S.B.C. 1979, c. 144); *Landlord and Tenant Act*, S.B.C. 1974, c. 45, s. 61(e) (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365 s. 8(3)); *Commercial Tenancies Act*, R.S.B.C. 1960, c. 207, s. 34 (see now *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 33).
4	Debt Collection and Collection Agents*	Mar. 1971	*Debt Collection Act*, S.B.C. 1973 c. 26 (see now *Debt Collection Act*, R.S.B.C. 1979, c. 88).
5	Expropriation*	Dec. 1971	——
6	Annual Report, 1971*	Dec. 1971	Not applicable.
7	Mechanics' Lien Act*	June 1972	*Builders Lien Amendment Act, 1984*, S.B.C. 1984, c. 16, s. 3 [in part]; *Builders Lien Amendment Act (No. 2), 1984*, S.B.C. 1984, c. 17, s. 1 [in part].
8	Deficiency Claims and Repossessions*	June 1972	*Conditional Sales Act*, S.B.C. 1973, c. 19 (see now *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373); *Bills of Sale Act*, S.B.C. 1973, c. 7 (see now *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48).
9	Legal Position of the Crown*	Dec. 1972	*Crown Proceedings Act*, S.B.C. 1974, c. 24 (see now *Crown Proceeding Act*, R.S.B.C. 1979, c. 86); *Interpretation Act*, S.B.C. 1974, c. 42, s. 13 (see now *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14).
10	Annual Report, 1972	Dec. 1972	Not applicable.
11	Interim Report on Evidence*	Feb. 1973	*Attorney-General Statutes Amendment Act, 1975*, S.B.C. 1975, c. 4, s. 6 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, ss. 37, 38).

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
12	Pre-Judgment Interest*	May 1973	*Prejudgment Interest Act*, S.B.C. 1974, c. 65 (see now *Court Order Interest Act*, R.S.B.C. 1979, c. 76).
13	Landlord and Tenant—Residential Tenancies*	Dec. 1973	*Landlord and Tenant Act*, S.B.C. 1974, c. 45 (see now *Residential Tenancy Act*, S.B.C. 1984, c. 10).
14	Annual Report, 1973	Jan. 1974	Not applicable.
15	Limitations—General*	Mar. 1974	*Limitations Act*, S.B.C. 1975, c. 37 (see now *Limitations Act*, R.S.B.C. 1979, c. 236); *Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 6 [in part].
16	Costs of Accused on Acquittal*	June 1974	———
17	Procedure Before Statutory Bodies*	Nov. 1974	———
18	A Procedure for Judicial Review of the Actions of Statutory Bodies*	Dec. 1974	*Judicial Review Procedure Act*, S.B.C. 1976, c. 25 (see now *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209).
19	Annual Report, 1974	Jan. 1975	Not applicable.
20	Costs of Successful Unassisted Lay Litigants*	Apr. 1975	———
21	The Termination of Agencies*	Apr. 1975	———
22	Powers of Attorney and Mental Incapacity*	May 1975	*Attorney-General Statutes Amendment Act*, 1979, S.B.C. 1979, c. 2, s. 52 (see now *Power of Attorney Act*, R.S.B.C. 1979, c. 334, s. 7).
23	Personal Property Security*	Oct. 1975	———
24	Security Interests in Real Property: Remedies on Default*	Dec. 1975	*Miscellaneous Statutes (Court Rules) Amendment Act*, S.B.C. 1976, c. 33, s. 94(a) [in part] (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 16); Supreme Court Rules, Rule 50(11), 3(2) [in part]; *Land Titles Act*, S.B.C. 1978, c. 25 [in part] (see now *Land Title Act*, R.S.B.C. 1979, c. 219, ss. 224–225); *Attorney General Statutes Amendment Act*, S.B.C. 1980, c. 1, s. 15 (see now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 21.1) [in part]; *Property Law Act*, R.S.B.C. 1979, c. 340, s. 28 [in part]; *Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 5 (see now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 16.1) [in part].

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
25	Annual Report, 1975	Jan. 1976	Not applicable.
26	Minors' Contracts*	Feb. 1976	*Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, ss. 1, 2, 10 (see now *Infants Act*, R.S.B.C. 1979, c. 196, Part 2.1 (ss. 16.1–16.11)).
27	Extra-Judicial Use of Sworn Statements*	Apr. 1976	*See*, e.g., *Mineral Act, 1977*, S.B.C. 1977, c. 54, s. 20(2).
28	Rule in *Bain* v. *Fothergill**	June 1976	*Conveyancing and Law of Property Act*, S.B.C. 1978, c. 16, s. 33 (see now *Property Law Act*, R.S.B.C. 1979, c. 340, s. 33).
29	Annual Report, 1976	Dec. 1976	Not applicable.
30	The Rule in *Hollington* v. *Hewthorn**	Jan. 1977	*Evidence Amendment Act, 1977*, S.B.C. 1977, c. 70 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, ss. 15(3), 80, 81).
31	Waiver of Conditions Precedent in Contracts*	Apr. 1977	*Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 49).
32	Proof of Marriage in Civil Proceedings*	Apr. 1977	*Attorney-General Statutes Amendment Act, 1979*, S.B.C. 1979, c. 2, s. 18 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, s. 58).
33	The *Statute of Frauds**	June 1977	*Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, ss. 7, 8 (see now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 54)
34	Tort Liability of Public Bodies*	June 1977	——
35	*Offences Against the Person Act, 1828*, Section 28*	Aug. 1977	*Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 3).
36	Annual Report, 1977	Jan. 1978	Not applicable.
37	*Absconding Debtors Act* and *Bail Act:* Two Obsolete Acts*	Mar. 1978	*Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11 s. 8, ss. 1, 2.
38	*The Replevin Act**	May 1978	Rules of Court, Rule 46 as amended Nov. 26, 1981 by B.C. Reg. 467/81. *Attorney General Statutes Amendment Act, 1982*, S.B.C. 1982, c. 46, ss. 3–6, 25, 37–41.
39	The *Attachment of Debts Act**	Oct. 1978	——
40	Execution Against Land*	Oct. 1978	——

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
41	Annual Report, 1978	Jan. 1979	Not applicable.
42	Creditor's Relief Legislation: A New Approach	Jan. 1979	———
43	Guarantees of Consumer Debts	June 1979	*Consumer Protection Amendment Act, 1980*, S.B.C. 1980, c. 6, s. 3. [in part].
44	Parol Evidence Rule	Dec. 1979	———
45	Annual Report 1979 (Limitation Periods in Actions Against Estates)	Jan. 1980	*Attorney General Statutes Amendment Act, 1980* S.B.C. 1980, c. 1, ss. 7, 17 (see now *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(4)(b); *Negligence Act*, R.S.B.C. 1979, c. 298, s. 7(3)).
46	Civil Litigation in the Public Interest	June 1980	———
47	Calculation of Interest on Foreclosure	Sept. 1980	*Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 28 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 18.1.).
48	The Recovery of Unauthorized Disbursements of Public Funds	Sept. 1980	*Financial Administration Act*, S.B.C. 1981, c. 15, s. 67.
49	Annual Report 1980 (Discount Rates)*	Jan. 1981	*Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 30 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51).
50	Cable Television and Defamation	March 1981	*Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 9 (see now *Libel and Slander Act*, R.S.B.C. 1979, c. 234, s. 1 ["broadcasting"].
51	Benefits Conferred Under a Mistake of Law	Sept. 1981	———
52	The Making and Revocation of Wills	Sept. 1981	———
53	Distress for Rent	Nov. 1981	———
54	Annual Report 1981	Jan. 1982	Not applicable.
55	Arbitration	May 1982	*Foreign Arbitral Awards Act*, S.B.C. 1985, c. 74 [in part].
56	Presumptions of Survivorship	Nov. 1982	———
57	Crown as Creditor: Priorities and Privileges	Nov. 1982	———

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
58	Interpretation of Wills	Nov. 1982	———
59	Interest and Jurisdictional Limits in the County and Provincial Courts [Printed as an Appendix to LRC 60]	July 1982	*Miscellaneous Statutes Amendment Act (No. 1), 1984*, S.B.C. 1984, c. 25, s. 63 (see now *Small Claims Act*, R.S.B.C. 1979, c. 387, s. 2(3)); *Miscellaneous Statutes Amendment Act (No. 2), 1984*, S.B.C. 1984, c. 26, s. 2 (see now *County Court Act*, R.S.B.C. 1979, c. 72, s. 29(2)).
60	Annual Report 1982	Jan. 1983	Not applicable.
61	Standing of a Common Law Spouse to Apply Under the *Family Compensation Act* [Printed as an Appendix to LRC 73]	Jan. 1983	*Family Law Reform Amendments Act, 1985*, S.B.C. 1985, c. 72, s. 3 (see now *Family Compensation Act*, R.S.B.C. 1979, c. 120, s. 1).
62	Interspousal Immunity in Tort	March 1983	*Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68, ss. 50-53, 79, 83, 98 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, c.55.
63	Peremptory Challenges in Civil Jury Trials	June 1983	*Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, ss. 3, 4 (see now, *Jury Act*, R.S.B.C. 1979, c. 210, ss. 18, 18.1).
64	Breach of Promise of Marriage	Aug. 1983	*Family Law Reform Amendments Act, 1985*, S.B.C. 1985, c.72, ss. 1, 36 (see now *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 75).
65	Foreign Money Liabilities	Sept. 1983	———
66	Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case	Sept. 1983	———
67	Bulk Sales Legislation	Oct. 1983	*Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, ss. 11–13.
68	Intentional Interference with Domestic Relations	Nov. 1983	*Family Law Reform Amendments Act, 1985*, S.B.C. 1985, c. 72, ss. 35, 37, 40 (see now *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 75). [in part].
69	Illegal Transactions	Nov. 1983	———
70	Statutory Succession Rights	Dec. 1983	———
71	Minor (Interim) Report on the *Land (Wife Protection) Act* [Printed as an Appendix to LRC 73]	Jan. 1984	*Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68, ss. 61-78 (see now *Land (Spouse Protection) Act*, R.S.B.C. 1979, c. 223).

No.	Title	Date	Recommendations Implemented in Whole or in Part by
72	Minor Report on The Jurisdiction of Local Judges: Stays of Execution and Instalment Orders [Printed as an Appendix to LRC 73]	Feb. 1984	Rules of Court, Rule 42(25) as amended by B.C. Reg. 18/85, s. 15 (effective April 1, 1985).
73	Annual Report 1983/84	April 1984	Not applicable.
74	Covenants in Restraint of Trade	April 1984	_____
75	Review of Civil Jury Awards	Sept. 1984	_____
76	Compensation for Non-Pecuniary Loss	Sept. 1984	_____
77	Settlement Offers	Sept. 1984	_____
78	The Authority of a Guardian	Jan. 1985	_____
79	A Short Form General Power of Attorney [Printed as an Appendix to LRC 80]	March 1985	_____
80	Annual Report 1984/85	April 1985	Not applicable.
81	Performance Under Protest	May 1985	_____
82	Minor Report on the Domicile of a Minor [Printed as an Appendix to LRC 86]	Sept. 1985	_____
83	Defamation	Sept. 1985	_____
84	Personal Liability Under a Mortgage or Agreement for Sale	Sept. 1985	_____
85	Mortgages of Land: The Priority of Further Advances	Jan. 1986	_____
86	Annual Report 1985/86	April 1986	Not applicable.

Appendix B

MATTERS UNDER CONSIDERATION BY LAW REFORM COMMISSION OF BRITISH COLUMBIA

1. Debtor-Creditor Relationship Topics
   (a) Court Order Interest Act
   (b) Shared Liability
   (c) Execution Against Shares and Securities
   (d) Fraudulent Conveyances and Preferences
   (e) Set-Off Against Assignees
2. Estates Topics
   (a) The Effect of Testamentary Instruments
   (b) Notice Requirements in Estate Matters
3. Contract Law Topics
   (a) Contractual Mistakes
   (b) Deeds and Seals
4. Floating Charges on Land
6. Legal Change and Prior Rights
7. Spousal Agreements
8. The Action *Per Quod Servitium Amisit*

Appendix C

MINOR REPORT
(LRC 79)

September 27, 1985

Honourable Brian R.D. Smith, Q.C.
Attorney General
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

Re: Minor Report (No. 82):
The Domicile of a Minor

On April 16th of this year the *Charter of Rights Amendments Act, 1985* (Bill 33), was introduced and given first reading. Among the changes embodied in the Bill was the repeal of the *Married Woman's Property Act* and its replacement by simple and concise provisions respecting the legal position of married persons. They establish that each spouse has a legal personality, separate and distinct from the other spouse. The Law Reform Commission commented favourably on such an initiative in its Report on Interspousal Immunity in Tort (LRC 62, 1983) and the recommendations made in that Report are implemented by Bill 33.

Among the other matters specifically dealt with in the equality provisions of Bill 33 is the right of a married woman to acquire a legal domicile separate and distinct from that of her husband. This represents an improvement over the former law under which a married woman acquired and retained the domicile of her husband. This "domicile of dependency" subsisted even where husband and wife had separated and no longer lived in the same jurisdiction.

There is, however, another aspect of the domicile of dependency on which Bill 33 is silent. This concerns the domicile of a minor. At common law, the domicile of a minor is that of his or her father.

The impact of Bill 33 on the rules for determining the domicile of a minor are uncertain. On one view, the child's domicile of dependency remains untouched by the Bill and we retain a legal rule under which the status of a person is arbitrarily determined with reference to sex. This would be clearly anomalous in the light of other provisions of Bill 33 aimed at attaining equality of the sexes under law.

On the other hand it might be argued that the child's domicile of dependency was intimately linked to its mother's domicile of dependency and with the abrogation of the latter the rules for determining the domicile of a minor have now changed. The difficulty with this view is that the nature of the change which has been wrought is uncertain and there are no rules which might be applied to determine the domicile of a minor.

In the case of a child born out of wedlock, the provisions of Bill 33 concerning child status are also a source of uncertainty so far as domicile is concerned. At common law, the domicile of an illegitimate child was that of the child's mother. The effect of Bill 33 is to eliminate the legal concept of illegitimacy. The Bill provides that "the person is the child of his natural

parents" and that "any distinction between the status of a child born inside marriage and a child born outside marriage is abolished." Again, it is difficult to state with certainty the effect this will have on the law of domicile. There is a distinct possibility, however, that these provisions will have inadvertently created a domicile of dependency of a child on a father of whom the child has no knowledge and with whom the child has had no contact.

This problem has received consideration in Ontario and legislation has recently been introduced which provides guidelines to be applied in determining the domicile of a minor. On June 4th, the *Family Law Act, 1985* was introduced into the Ontario Legislature and given first reading. Section 69 of the Act provides:

> **69.** The domicile of a person who is a minor is,
> (a) if the minor habitually resides with both parents and the parents have a common domicile, that domicile;
> (b) if the minor habitually resides with one parent only, the parent's domicile;
> (c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or
> (d) if the minor's domicile can not be determined under clause (a), (b) or (c), the jurisdiction with which the minor has the closest connection.

This provision is one which we believe should be adopted in this province. It would meet the concerns described above by providing guidance on a matter rendered uncertain by Bill 33.

It is our recommendation that a provision similar to section 69 be enacted as section 55A of the *Law and Equity Act*. At the time this letter was finalized, Bill 33 had not yet received second reading so the opportunity may exist to implement this recommendation through amendments to it.

This letter is to be taken as a Minor Report (No. 82) of the Law Reform Commission recommending a change in the law as herein set out. This recommendation was approved by the Commission at a meeting on September 26, 1985.

Yours sincerely,

Arthur L. Close
Chairman

ALC/ss

Appendix D

COMMISSION WORK REVIEWED AND CITED

Following is a partial list of reviews, articles, books, and cases in which the Commission's work has recently been referred to or discussed.

(a) *Articles and Reviews*

W.A. Bogart, "Developments in the Canadian Law of Standing," (1984) 3 Civ. J.Q. 339.

W.A. Bogart, "Review - Law Reform Commission of British Columbia, Report on the Crown as Creditor: Priorities and Privileges," (1984) 48 C.B.R. 181.

Bowles and Whalen, "Working Paper on Foreign Money Liabilities," (1982) 60 Can. B. Rev. 805.

F.M. Catzman, "Law Reform Commission of British Columbia, Bulk Sales Legislation, Working Paper No. 40," (1983) 8 Can. Bus. L.J. 109.

B. Crawford, "The Legal Aspect of Money, 4th ed., by F.A. Mann," (1982-3) 7 Can. Bus. L.J. 368.

G.H.L. Fridman, "Law Reform Commission of British Columbia, Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case, Working Paper No. 36," (1982-83) 7 Can. Bus. L.J. 353.

G.H.L. Fridman and J.G. McLeod, *Restitution*, Toronto, The Carswell Company Limited, 1982 at 166 to 172.

F.W. Hansford, Book Review, "Restitution by G.H.L. Fridman and James G. McLeod, . . . Unjust Enrichment by Georege B. Klippert . . ." (1984) 18 U.B.C.L. Rev. 177.

G.B. Klippert, *Unjust Enrichment*, Toronto, Butterworth's, 1983 at 152 to 156.

H.W.D. Lewis, Note on "Rule in *Bain* v. *Fothergill*," (1985) 135 N.L.J. 479.

J.K. Maxton, "Execution of Wills: The Formalities Considered," [1982] 1 Canterbury L. Rev. 393.

F. Meisel, "British Columbia Law Reform Commission Report on Arbitration," [1983] Civ. J.Q. 197.

M.H. Ogilvie, Review, "Report on Covenants in Restraint of Trade. Law Reform Commission of British Columbia," (1985) 63 Can. B. Rev. 250.

S.A. Rae, "Inflation and the Law of Contracts and Torts," (1982) 14 Ottawa L. Rev. 465.

S. Schwartz "Review - Law Reform Commission of British Columbia, Report on Illegal Contracts," (1985) 10 Can. Bus. L.J. 83.

L.M. Sherwood, "Contracts - Illegality and Section 305.1 of the Criminal Code," (1983) 61 Can. B. Rev. 866.

W.M.B. Voroney, Case Comment on *Stevens* v. *Quinney*, (1980) 101 D.L.R. (3d) 289, [1979] 5 W.W.R. 284, (1980) 5 Sask. R. 219; (1980) 60 Can. B. Rev. 688.

S.M. Waddams, "Foreign Money Liabilities: Law Reform Commission of British Columbia, Working Paper No. 33," (1981-82) 6 Can. Bus. L.J. 352.

S.M. Waddams, "Law Reform Commission of British Columbia, Illegal Contracts, Working Paper No. 38," (1982-83) 7 Can. Bus. L.J. 361.

S.M. Waddams, "Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention?" (1985) 63 Can. B. Rev. 734.

D.M. Waters, "Trusts in the Setting of Business, Commerce and Bankruptcy," (1983) 21 Alta. L. Rev. 395.

B.H. Wildsmith, "Report on Civil Litigation in the Public Interest," (1982-83) 7 Dalhousie L.J. 463.

(b) Cases

Acli Limited (A.C. Israel Woodhouse Co. Ltd.) v. *Cominco Ltd.*, (1985) 61 B.C.L.R. 177 (B.C.C.A.).

Aktary v. *Dobroslavic et al*, (1984) 48 B.C.L.R. 26 (B.C.S.C.).

Air Canada v. *A.G.B.C.*, (1983) 41 B.C.L.R. 41 (B.C.S.C.).

Babb v. *Capital Business Machines Ltd. et al*, [1984] 5 W.W.R. 628 (Y.T.C.A.).

Borg-Warner Acceptance Canada Ltd. v. *Mercantile Bank of Canada and Peat Marwich & Mitchell*, (1985) 65 B.C.L.R. 1, [1985] 5 W.W.R. 605 (B.C.C.A.).

David Grute & Sons Inc. v. *Conbrio Designs Ltd.*, [1982] B.C.D. Civ. 3463-05 (Co. Ct. Van.).

First Western Capital Ltd. v. *Wardle et al*, (1984) 59 B.C.L.R. 309, 50 C.P.C. 318 (B.C.C.A.).

Imperial General Properties Ltd. v. *The Queen*, [1984] 1F.C. 146 (F.C.T.D.).

Latchford v. *Farker*, [1984] B.C.D. Civ. 3579-04 (B.C.S.C.).

Lynden Transport Inc. v. *R. in Right of British Columbia*, (1985) 62 B.C.L.R. 314 (B.C.S.C.).

Moore v. *Fordham et al*, (1985) 64 B.C.L.R. 394 (B.C.S.C.)

Pickering et al v. *Deakin, Deakin, Dimmock & Topolite Distributros Ltd.*, [1985] 1 W.W.R. 289 (B.C.C.A.).

R. in Right of B.C. v. *Yu et al*, (1984) 55 B.C.L.R. 329 (B.C.S.C.).

Rutherford Bazett & Co. v. *Penticton Pub Ltd.*, (1983) 50 B.C.L.R. 21, 41 C.P.C. 226, (B.C.S.C.).

Sehlstrom v. *Pich*, (1983) 36 C.P.C. 79 (B.C.S.C.).

Sur-Del Carpets and Rugs (M.R. Ltd.) v. *Ciprut*, (1985) 64 B.C.L.R. 53 (Co. Ct. Van.).